No. 89-1321

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

PAUL BORN, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether certain evidence, which directly contradicted petitioner's testimony, was properly admitted on rebuttal.

2. Whether a question by the prosecutor to petitioner on cross-examination amounted to harmless error.

3. Whether certain testimony by petitioner concerning his non-membership in a motorcycle gang was properly excluded.

4. Whether the government improperly declined to restrict its cross-examination of a defense witness or to grant that witness immunity when the witness refused to testify at trial.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Diggs v. *Owens*, 833 F.2d 439 (3d Cir. 1987), cert. denied, 485 U.S. 979 (1988)	11
Francis v. *Franklin*, 471 U.S. 307 (1985)	9
Government of the Virgin Islands v. *Smith*, 615 F.2d 964 (3d Cir. 1980)	12
Pillsbury Co. v. *Conboy*, 459 U.S. 248 (1983)	12
Richardson v. *Marsh*, 481 U.S. 200 (1987)	9
Schoepflin v. *United States*, 391 F.2d 390 (9th Cir.), cert. denied, 393 U.S. 865 (1968)	8
Spencer v. *Texas*, 385 U.S. 554 (1967)	9
United States v. *Abel*, 469 U.S. 45 (1984)	8
United States v. *Chaimson*, 760 F.2d 798 (7th Cir. 1985)	6-7, 8
United States v. *Colon*, 880 F.2d 650 (2d Cir. 1989)	7, 8
United States v. *Ortiz*, 857 F.2d 900 (2d Cir. 1988), cert. denied, 109 S.Ct. 1352 (1989)	7
United States v. *Paris*, 827 F.2d 395 (9th Cir. 1987)	11
United States v. *Pennell*, 737 F.2d 521 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985)	12
United States v. *Thornton*, 733 F.2d 121 (D.C. Cir. 1984)	12
United States v. *Turkish*, 623 F.2d 769 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981)	12

Cases – Continued: Page

United States v. *Warren*, 453 F.2d 738 (2d Cir. 1971), cert. denied, 406 U.S. 944 (1972) 8

Constitution, statutes and rules:

U.S. Const. Amend. V 11

21 U.S.C. 841(a)(1) 2

21 U.S.C. 846 2

Fed. R. Evid.:

Rule 404(b) 6, 7, 8

Rule 602 10

Miscellaneous:

D. Louisell & C. Mueller, *Federal Evidence* (1979) 8

J. Weinstein & M. Berger, *Weinstein's Evidence* (1989) 7

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 888 F.2d 1165.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1989. A petition for rehearing was denied on December 11, 1989. Pet. App. 18. The petition for a writ of certiorari was filed on February 12, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted

of conspiracy to distribute cocaine and to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. He was also convicted on four counts of distributing cocaine and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of 23 years' imprisonment on each count, to be followed by ten years of supervised release. Pet. App. 3-4, 5.

1. The evidence at trial showed that petitioner was involved in supplying cocaine for a number of cocaine sales made to a government informant, Robert Blessing, and an undercover DEA agent, John Riley. Blessing first arranged two cocaine purchases from Oscar DeLisle on April 2 and April 13, 1987, at the ABC Lounge in Streamwood, Illinois. At the first sale, Blessing and Agent Riley met with petitioner, DeLisle, co-defendant Donald Mazzanti, and Daniel Taglia. After some discussion, petitioner and Mazzanti left the bar; they returned shortly thereafter and spoke to DeLisle. DeLisle then gave two ounces of cocaine to Blessing and Agent Riley. Pet. App. 2.

On April 13th, Blessing and Agent Riley met petitioner, DeLisle, and Mazzanti in the ABC Lounge parking lot. DeLisle stated that the cocaine had to be picked up in Elgin, Illinois. Petitioner and Mazzanti then drove off in an orange van and DeLisle left. When the van returned, Blessing and Agent Riley got into the van and found petitioner and DeLisle inside. DeLisle took a clear plastic bag filled with approximately two ounces of cocaine from a shopping bag filled with similar bags and gave it to Agent Riley, who paid him $3200. Pet. App. 2; Gov't C.A. Br. 5-6.

Blessing arranged a third cocaine sale for May 13, 1987. That afternoon, Blessing and Agent Riley met DeLisle and Mazzanti at DeLisle's house. After some delay, DeLisle said that the cocaine had arrived, and he then left the house. A DEA surveillance agent observed DeLisle enter the ABC

Lounge at about the same time that petitioner pulled into the parking lot in his maroon van. After petitioner entered the lounge, DeLisle came out and walked over to petitioner's van, from which he removed a dark-colored package. DeLisle then returned to his house, where he sold Agent Riley two ounces of cocaine. Pet. App. 2-3; Gov't C.A. Br. 7-8.

Over the next two months, Blessing and Agent Riley made arrangements with Taglia and James Westerman for a multi-kilogram cocaine transaction. On July 7, 1987, after the transaction had been delayed several times, Taglia explained to Blessing and Agent Riley that he was having trouble reaching his source, who was going to be appearing in court. Both petitioner and Mazzanti appeared in state court that morning. Gov't C.A. Br. 8-9. Finally, Taglia agreed to supply a quantity of cocaine worth $175,000 at a price of $32,000 per kilogram on July 13, 1987. On that day, Blessing, Agent Riley and a second undercover DEA agent, Bill Maloney, drove with Taglia to a pizzeria in Streamwood, where they met Mazzanti and DeLisle. Pet. App. 3. While they waited, someone commented that the cocaine would be coming in a white plastic paint pail. Gov't C.A. Br. 10. At one point, Mazzanti made a phone call, explaining that he was trying to reach "my guy Paul." Pet. App. 3.

Shortly thereafter, petitioner drove his maroon van into the parking lot. At Mazzanti's request, Blessing gave Mazzanti his car keys, and Mazzanti left the restaurant. In the parking lot, petitioner removed a large white plastic pail from his van; Mazzanti then transferred the pail into the trunk of Blessing's car. After Mazzanti returned to the restaurant, Blessing went to the car, tasted the cocaine, and told the agents that the cocaine was suitable. DEA agents then arrested DeLisle, Mazzanti, and petitioner. Pet. App. 3; Gov't C.A. Br. 12. Inside petitioner's van, the agents found three bags of cocaine, a .357 magnum pistol, and

a telephone paging device. The white plastic pail in the trunk of Blessing's car contained approximately 12 pounds of cocaine. *Ibid.*

2. Petitioner's defense was that the government witnesses mistook him for either John Burroughs or John Newell, two men who resembled him and who frequented the ABC Lounge. Pet. App. 4; Pet. 6-7. In his testimony at trial, petitioner admitted that he was at or near the locations of two of the cocaine transactions, but he denied being involved in any of the sales. Petitioner also admitted that he was a frequent patron of the ABC Lounge, but he testified that he knew nothing about the cocaine sales there. Petitioner acknowledged that he owned a maroon van, but he explained that DeLisle and Mazzanti sometimes worked for him and kept their work tools in his van. Pet. App. 4. Petitioner sought to testify that Mazzanti, Burroughs, and Newell were members of the Brothers motorcycle gang and that he was not a member of that gang. He offered that testimony to support his theory that the cocaine transactions were carried out by members of that gang. The district court, however, excluded that testimony as irrelevant. *Ibid.*

On cross-examination, the government asked petitioner whether he had discussed the cocaine purchases with DeLisle and whether he had used the term "two Z's" of cocaine in a discussion with DeLisle. Petitioner denied having any discussion or making any statement regarding "two Z's," and he denied any knowledge of that term. Pet. App. 4.

In rebuttal, the government called Detective John Mueller, a state police officer who testified that he had discussed cocaine transactions with petitioner. Mueller added that he had used the term "Z's" in their conversation to refer to ounces of cocaine and that petitioner appeared to understand the meaning of the term. Pet. App. 4.

3. The court of appeals affirmed. Pet. App. 1-17. It held that the district court did not abuse its discretion by refusing to allow petitioner to introduce evidence concerning

motorcycle gang membership. Pet. App. 5-8. The court rejected petitioner's contention that the testimony was relevant to his defense because a motorcycle gang would not be likely to allow a non-member like himself to participate in its drug deals. The court agreed with the district court that petitioner "was not competent to testify to the machinations of the gang as he lacked personal knowledge of these matters since he was not a member of the group." Pet. App. 6. The court added that petitioner had failed to offer the testimony of any motorcycle gang members concerning the operation of the gang or to proffer any evidence concerning the motorcycle gang's drug-selling practices that would support his defense. *Ibid.*

For the same reasons, the court rejected petitioner's argument that the excluded testimony was relevant to his mistaken identity defense. Pet. App. 6-7. The court noted that petitioner "was allowed to introduce evidence on this defense" and "was prevented only from bolstering this [defense] with other extraneous evidence concerning the motorcycle gang." Pet. App. 6.

The court held that any error in the exclusion of the testimony about motorcycle gang membership was harmless in any event, since "[t]here was overwhelming evidence of [petitioner's] guilt"; petitioner "was * * * permitted to introduce evidence that others who frequented the ABC Lounge resembled him in physical and personal characteristics"; and the district court instructed the jury on the issue of mistaken identity. Pet. App. 7, 8.

The court of appeals next held that the district court did not abuse its discretion when it admitted the rebuttal testimony of Detective Mueller. Pet. App. 8-11. The court noted first that the government had kept its agreement not to introduce other acts evidence against petitioner in its case-in-chief. Pet. App. 9. As the court explained, "[i]t was only after [petitioner] denied any involvement in the charged drug

conspiracy during his defense that the government presented Detective Mueller's testimony in its rebuttal case." *Ibid.*

Relying on *United States* v. *Chaimson*, 760 F.2d 798 (7th Cir. 1985), the court ruled that Mueller's testimony was properly admitted under Fed. R. Evid. 404(b) to show intent. Pet. App. 9-10. The court held that the "blanket denial of any wrongdoing" issued by petitioner when he took the stand "was meant to negate any evidence of intent." Pet. App. 10. The government in its rebuttal could therefore properly seek "to overcome [petitioner's] absolute denial and reestablish the element of intent." *Ibid.*[1]

Finally, the court concluded that the probative value of Detective Mueller's testimony on the issue of petitioner's knowledge and intent outweighed any danger of unfair prejudice, minimized as it was by the district court's instruction to the jury "that the evidence should be considered only as to [petitioner's] intent and knowledge." Pet. App. 11.

ARGUMENT

1. Petitioner claims (Pet. 9-22) that Detective Mueller's testimony was improperly admitted for several reasons.

a. Petitioner first argues (Pet. 9-12) that the court of appeals' approach in determining the admissibility of Mueller's testimony on rebuttal conflicts with that taken by the Second Circuit. The Seventh Circuit allows the government to introduce evidence under Rule 404(b) to prove intent when specific intent is an element of the charged offense. Pet. App. 9-10; *United States* v. *Chaimson*, 760 F.2d

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[1] Since it concluded that Mueller's testimony was admissible to counter petitioner's blanket denial of wrongdoing, the court saw no need to address petitioner's argument that he had not placed his intent in issue when he denied knowing the meaning of the term "Z's" of cocaine and that the prosecutor had asked about the term without a good faith basis. Pet. App. 10 n.4.

798, 805-806 (1985); see generally 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 404[09], at 404-64 to 404-66 (1989). The Second Circuit, on the other hand, has adopted a rule that the government may not introduce evidence under Fed. R. Evid. 404(b) to prove intent if a defendant does not directly contest that element of the offense. *United States* v. *Colon*, 880 F.2d 650 (1989); *United States* v. *Ortiz*, 857 F.2d 900 (1988), cert. denied, 109 S. Ct. 1352 (1989). In the Second Circuit's view, the claim that a defendant had no involvement in the acts constituting the offense—as opposed to a claim that he did the acts innocently or mistakenly—does not raise a dispute as to the issue of intent. *Colon*, 880 F.2d at 656-657; *Ortiz*, 857 F.2d at 903-904.

While there is a difference in the approaches of the Seventh and Second Circuits, that difference is not implicated by this case. The Second Circuit has explained that, in order to remove the issue of intent from a case, a defendant must (1) unequivocally express a decision not to dispute the issue of intent, and (2) agree to accept an instruction to the jury that, if it finds the other elements of the offense established beyond a reasonable doubt, it can resolve the issue of intent against the defendant because intent is not disputed. *Colon*, 880 F.2d at 659; *Ortiz*, 857 F.2d at 903-904. While the Second Circuit does not require a formal stipulation to satisfy the first requirement, "a defendant must make some statement to the [trial] court of sufficient clarity to indicate that the issue [of intent] will not be disputed." *Colon*, 880 F.2d at 659. Even if petitioner's theory of defense was sufficient to put the district court on notice that he did not dispute the issue of intent, there is no indication that petitioner was willing to accept the required instruction that the jury should find the necessary specific intent if it found the other elements of the offense. To the contrary, after denying any involvement in the cocaine transactions, petitioner specifically denied that he had any in-

tent of involvement. 4/28 Tr. 1496, 1502. Under these circumstances, the Second Circuit would not have reached a different result in this case. *Colon*, 880 F.2d at 659.

In addition, petitioner's claim that the Second Circuit would not have admitted Mueller's testimony under Rule 404(b) overlooks the fact that Mueller's testimony was properly admissible for a purpose wholly independent of proving petitioner's intent and knowledge: to impeach his credibility through specific contradiction. Petitioner testified both on direct and on cross-examination that he knew nothing about any cocaine; on cross-examination, he further testified that he did not know the meaning of the term "Z's" of cocaine. 4/28 Tr. 1453, 1496-1499, 1502. Mueller's testimony directly contradicted petitioner's testimony. It was therefore properly admissible to impeach petitioner's credibility, regardless whether it was also separately admissible under Rule 404(b). See *United States* v. *Abel*, 469 U.S. 45, 56 (1984); 3 D. Louisell & C. Mueller, *Federal Evidence* § 343, at 498-499 & n.85 (1979); see, *e.g.*, *United States* v. *Warren*, 453 F.2d 738, 742 (2d Cir. 1971), cert. denied, 406 U.S. 944 (1972); *Schoepflin* v. *United States*, 391 F.2d 390, 396 (9th Cir.), cert. denied, 393 U.S. 865 (1968).[2]

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[2] Petitioner also renews his contention (Pet. 12-16) that Mueller's testimony should not have been admitted because the government represented before trial that it would not introduce any evidence of other bad acts by petitioner under Rule 404(b) during its case-in-chief. As the court of appeals explained, however, the government "lived up to its agreement" because it did not introduce any evidence under Rule 404(b) during its case-in-chief. Detective Mueller's testimony was introduced in rebuttal only after petitioner denied on direct examination any involvement in the cocaine transactions. Pet. App. 9. As the court of appeals noted (Pet. App. 10), the use of Mueller's testimony was proper at that point because the government needed to "reestablish the element of intent." *Ibid.* See, *e.g.*, *United States* v. *Chaimson*, 760 F.2d 798, 806 (7th Cir. 1985).

b. Petitioner also protests (Pet. 17-19) that, in concluding that the probative value of that testimony was not outweighed by the danger of unfair prejudice, the court of appeals improperly assumed that the jurors followed the instruction to consider Detective Mueller's testimony only as to petitioner's intent and knowledge. That contention is meritless; this Court has repeatedly reaffirmed the "crucial" and "almost invariable" assumption that jurors carefully follow their instructions. See, *e.g.*, *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987); *Francis* v. *Franklin*, 471 U.S. 307, 325 n.9 (1985); *Spencer* v. *Texas*, 385 U.S. 554, 562 (1967).[3]

2. Petitioner contends (Pet. 19-22) that the prosecutor improperly asked him on cross-examination whether he had used the term "two Z's" of cocaine in a conversation with DeLisle on May 13, 1987, when there was no evidence to show that such a conversation occurred.

Since the district court did not require development of the record on this point, the record does not reflect the basis for the prosecutor's question. Even assuming that the prosecutor's question was erroneous, however, the error was clearly harmless. As the court of appeals pointed out (Pet. App. 11 n.4), the question was not the basis for the admission of Mueller's testimony in rebuttal; that testimony was admitted based on petitioner's blanket denial of wrongdoing. Nor, evaluating the asserted error within the context of the whole record, did it have any notable significance: the prosecution merely asked whether a conversation had taken place and was given a negative answer. The impact

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[3] Petitioner also complains (Pet. 19) that the prosecutor "misused" Mueller's evidence by stating to the jury that Mueller's testimony showed petitioner to be a liar. But because Mueller's testimony was admitted to impeach the credibility of petitioner's denials of knowledge of the cocaine transactions, it was entirely proper for the prosecution to argue that the evidence showed that petitioner was lying when he denied having any knowledge of cocaine sales at the ABC Lounge.

of the question about the term "Z's" pales in comparison to what the court of appeals identified as the "overwhelming evidence" of petitioner's guilt. Pet. App. 7, 8. Government agents met with petitioner at two cocaine sales, and they observed him acting as the supplier of the cocaine on those and two subsequent occasions, the last of which involved 12 pounds of cocaine. When petitioner was arrested, he had three bags of cocaine in his van. Under these circumstances, the jury could not have attached much weight to the question whether petitioner knew the meaning of the term "Z's."

3. Petitioner renews his contention (Pet. 24-33) that the district court abused its discretion by refusing to allow him to testify that other participants in the drug sale were members of a motorcycle gang while he was not. Under petitioner's theory, his excluded testimony was relevant because his non-membership in the motorcycle gang made it less likely that he was involved in a drug conspiracy in which the other participants were gang members.

That conclusion follows, however, only if there was some evidence to show that the motorcycle gang would not be likely to include a non-member in their drug transactions. As the court of appeals pointed out (Pet. App. 6), however, petitioner was not competent to give that testimony because, as a self-proclaimed non-member, he lacked personal knowledge about the internal functioning of the gang. See Fed. R. Evid. 602. Nor did petitioner proffer any other evidence regarding the motorcycle gang's drug-selling practices to support his hypothesis. Thus, petitioner's testimony about his non-membership in the motorcycle gang would have been relevant only if the jury had engaged in speculation that the gang would not include a non-member in a drug deal; as such, it was properly excluded at trial.

In any event, the court of appeals correctly concluded that any error in the exclusion of petitioner's testimony was

harmless. Contrary to petitioner's suggestions (Pet. 25-26), he was allowed to introduce evidence and argue that Burroughs and Newell, the two gang members who resembled him and frequented the ABC Lounge, were the likely offenders to support his mistaken identity defense. Pet. App. 6, 8; 4/28 Tr. 1447-1448; 4/29 Tr. 1688, 1692. Moreover, the district court gave the jury a mistaken identity instruction. Pet. App. 8. Finally, there was "overwhelming evidence" of petitioner's guilt, including his presence and the use of his van at the drug buys on May 13, 1987 and July 13, 1987. Pet. App. 7, 8. Petitioner's fact-bound claim does not warrant further review.

4. Finally, petitioner contends (Pet. 33-39) that he was prejudiced because he was unable to call Daniel Taglia, who had pleaded guilty in the case and was awaiting sentencing, as a defense witness. Petitioner asserts that Taglia invoked his Fifth Amendment privilege against compulsory self-incrimination after the prosecutor refused to restrict his cross-examination of Taglia to "nonincriminating areas" and declined to offer Taglia immunity.

Petitioner cites no authority for the proposition that a prosecutor should agree to handicap his exploration of a witness's statements or credibility on cross-examination, or that the trial process will be aided by such a limitation. Nor is petitioner on firmer ground in claiming that Taglia should have been compelled to testify or that the government should have granted Taglia immunity. "[T]he Sixth Amendment right of an accused to compulsory process to secure the attendance of a witness does not include the right to compel the witness to waive his Fifth Amendment privilege. Nor is an accused entitled to compel a prosecutor to grant immunity to a potential defense witness to get him to testify." *United States* v. *Paris*, 827 F.2d 395, 399 (9th Cir. 1987) (internal quotation marks omitted); see also *Diggs* v. *Owens*, 833 F.2d 439, 444 (3d Cir. 1987), cert. denied, 485 U.S. 979 (1988);

United States v. *Thornton*, 733 F.2d 121, 125 (D.C. Cir. 1984). It is widely agreed that the decision to grant immunity is a responsibility only of the Executive Branch. See, *e.g.*, *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983); *United States* v. *Pennell*, 737 F.2d 521, 526-528 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *United States* v. *Turkish*, 623 F.2d 769, 771-777 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981). Petitioner failed to make any showing that Taglia had evidence that would have exculpated petitioner if Taglia had been compelled to testify; at most, Taglia's testimony would have tended to minimize his own involvement in the conspiracy even though he had already pleaded guilty. See Pet. 34-35. There is therefore no basis for any claim that the prosecutor's failure to grant immunity for Taglia denied petitioner a fair trial. Compare *Government of the Virgin Islands* v. *Smith*, 615 F.2d 964 (3d Cir. 1980).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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